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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1003

FRED STARK, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37a-55a) is reported at 525 F. 2d 422. The Board's decision and order (Pet. App. 1a-36a) are reported at 213 NLRB No. 38.

JURISDICTION

The judgment of the court of appeals (Pet. App. 56a-57a) was entered on December 2, 1975. The

petition for a writ of certiorari was filed on January 15, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the Company restrained its employees in the exercise of their organizational rights and discharged six employees because of their union activity.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, as amended (61 Stat. 140, 73 Stat. 525, 29 U.S.C. 158(a)), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

STATEMENT

A. The Board's Findings of Fact

Petitioner Stark is a family partnership comprised of Fred Stark, Harold Stark, and Rita Stark. Stark and its two affiliated corporations, Jamaica 201 and

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Jamaica 202 (hereafter collectively referred to as "the Company"), own and lease commercial and residential buildings and properties (A. 3, 33).[1]

On April 30, 1973, after some of the Company's employees had indicated an interest in being represented by the Union,[2] Union organizer Tony Poccio met with employees Charles Thompson, Roger Evans, Wayne Huff, Jeffrey Maksymchak, Felipe Ortiz, George Peters, and Kenroy Bishop. At the meeting, each of these seven employees signed an authorization card (A. 4, 60, 82, 109-110, 114-115). By letter of May 8, 1973, the Union requested the Company to recognize it as the bargaining representative for the employees (A. 5, 47-48). The Company received the letter on May 10, and within a week it had discharged six of the seven employees who had signed authorization cards (A. 5, 9, 15-16, 50, 83, 111, 132, 174, 205). The facts relating to the discharges are as follows:

1. Evans, Huff, and Maksymchak were employed as general laborers by the Company. Thompson was employed as a handyman. Thompson, Evans, and Maksymchak had each worked for the Company for 12 months prior to their discharges, and Huff, who previously had been employed by the Company in

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[1] "A." refers to the separate appendix, and "R.A." to the appendix to respondent's brief, filed in the court of appeals. A copy of each has been lodged with the Clerk of this Court.

[2] Local 32B, Service Employees International Union, AFL-CIO.

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1972, worked for it for four months prior to his discharge (A. 46-47, 81-82, 109-110, 131-132).

On May 11, 1973, the day after receiving the Union's request for recognition, Harold Stark assigned Thompson, Evans, and Huff to a cleaning job. Because the job was difficult, the three men drove to the Company's office to pick up additional men to assist them. Harold Stark was away from the office, so the three employees waited for him in their truck (A. 6-7, 50-51, 66-67, 111-112, 134). Meanwhile, when Maksymchak reported for work at the office, he was told by a secretary to wait for the Company's office manager to arrive. He waited outside the office in his station wagon, where he was joined by Thompson, Evans, and Huff (A. 7, 51, 83, 112, 134).

While the four employees were waiting, Maksymchak told the others that he did not feel well and was not going to work (A. 7, 51, 78, 116). When Harold Stark arrived at the office, he approached the station wagon where the four employees were sitting and asked Maksymchak whether he was going to work that day; Maksymchak replied that he did not feel like working (A. 7, 83, 112, 134). Stark, addressing himself to the four employees, then declared: "[Y]ou are all drunk, you are all fired" (A. 7, 52, 83, 112, 134).

The following day, and numerous times thereafter, Maksymchak returned to the Company's office and requested his job back. On one occasion, Harold Stark told him that joining the Union was "like

stabbing [Harold Stark] in the back" and that he could have his job back if he got out of the Union. Maksymchak decided to remain in the Union and did not attempt to obtain further work with the Company (A. 8, 84, 104-105).

Shortly after the May 11 discharge, Fred Stark telephoned Rudolph Larmond, a Union official, and inquired about the meaning of the Union's letter seeking recognition. After briefly mentioning the Union's purpose, Larmond gave Fred Stark the names of two or three Union adherents, and Stark replied, "Oh, I fired them. They're all drunk, and I fired them" (A. 5, 43).

2. On May 14, 1973, Fred Stark met with George Peters [3] at a jobsite. Referring to the Union, Stark asserted that Peters had "stabbed" him in the back, and that he (Stark) had just fired four employees, naming the four Union members discharged on May 11. Stark added, "I'm surprised at you, Mr. Peters, you're supposed to be my foreman, you know, you're not supposed to be joining a union * * *." Stark also stated that he would forget about the entire matter and that Peters could keep his job if he stayed away from the Union (A. 9, 202-203).

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[3] Peters had been hired by the Company in September of 1971, and he worked in property maintenance. He received his assignments from Fred or Harold Stark and was assigned a work crew of two or more employees to direct. He worked with the crew and was primarily responsible for seeing that work projects were properly completed (A. 22, 201, 214, 279-280).

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On May 15, Peters told Fred Stark that he would be absent from work the following day because he was going for medical treatment at the Veterans Administration Hospital.[4] Stark said, "[M]ake sure you stay away from the Union" (A. 10, 203). The following day, instead of going to the hospital, Peters drove the four discharged employees to the Union's headquarters, where they gave affidavits concerning their discharges. When Peters reported to work the next day, May 17, Fred Stark said, "I see you went to the Union again yesterday. I told you to stay from the Union * * * evidentally [sic], Mr. Peters you don't learn * * * you're fired" (A. 11, 205).

3. Felipe Ortiz, who was a porter at one of the Company's rental buildings, was responsible for taking care of the public areas in the building and on the building grounds. On May 16, 1973, while Ortiz was on the building grounds, Harold Stark told him to pick up dog manure with his hands (A. 9, 163, 169, 172, 178, 185). Ortiz asked that he be permitted to use a shovel and a broom, but Stark insisted that he remove the dog manure only with his hands. When Ortiz refused to perform the assignment, Harold Stark told him: "[Y]ou're fired, go home" (A. 9, 172, 186).

4. On May 17, 1973, shortly after the discharge of Peters, Harold Stark had a brief discussion con-

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[4] Peters told Stark that he had been spitting blood. This condition was the result of an on-the-job injury Peters incurred in 1971 while he was employed by the Company (A. 10, 208).

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cerning the Union with Kenroy Bishop, another employee. Stark stated that he had "fired all the guys" who had signed for the Union except Bishop. Stark added: "[T]he Union is no good * * * they're going to mess this place up," and he said that Bishop should "give up on the union, because it won't come here" (A. 12, 146-147).

B. The Board's Conclusions and Order

Upon the foregoing facts, the Board concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging the six employees because of their Union activity.[5] The Board also found that the Company violated Section 8(a)(1) of the Act by coercively warning employees Bishop and Peters concerning their Union activity and by telling employee Maksymchak that he could have his job back if he got out of the Union (Pet. App. 31a).

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[5] The Administrative Law Judge (ALJ), whose findings the Board adopted, observed that "the case revolves substantially around credibility resolutions. If the substance of the General Counsel's testimony is accepted the complaint is substantiated. If the substance of the testimony of the Respondent is accepted the complaint falls" (Pet. App. 17a-18a). The ALJ credited the General Counsel's witnesses (Pet. App. 19a-20a, 21a-29a).

At the outset of the hearing, Company counsel moved for sequestration of witnesses, "because in this case there will be a very sharp issue of credibility involved"; the persons sequestered were to have included the six alleged victims of discriminatory discharges. The ALJ stated that he was prepared to grant the motion except for these six, since "[t]he Board's uniform practice has been not to apply the rule to those persons" (R.A. 1).

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The Board ordered the Company to cease and desist from these unfair labor practices and from in any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. The Board also directed the Company to offer the six discharged employees reinstatement and to compensate them for their lost earnings (Pet. App. 32a-33a).

C. The Decision of the Court of Appeals

The court of appeals held that "the ALJ should have had authority to sequester the four employee witnesses [6] during their respective testimony to the May 11 events, and that, under the rather typical facts here presented, failure to have exercised that discretion in favor of sequestration would have been an abuse of discretion" (Pet. App. 52a). The court concluded, however, that the Board's order was entitled to enforcement because, "[a]part from the repetitive testimony of these four witnesses, the ALJ had extremely solid ground for his credibility findings" (Pet. App. 53a). Judge Friendly, speaking for the court, explained (Pet. App. 53a-54a):

> Even as to the May 11 incident, the testimony of the four discriminatees found support in that of the two office workers called by respondent, one of whom denied that there were any signs in the car that the men had been drinking and the other of whom was asked no questions on the subject although she had observed Thompson on

[6] Thompson, Evans, Huff, and Maksymchak.

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the afternoon at issue. In addition, although the ALJ used his findings that Harold Stark had lied about the May 11 incident to discredit some of Stark's other testimony, he could equally well have found that flaws in other testimony discredited that in regard to May 11. We refer particularly to Harold Stark's failure to make specific denials of Maksymchak's testimony of what occurred on May 12 when Maksymchak sought reinstatement, and of Bishop's testimony concerning the conversation on May 17, and to the failure to call Fred Stark, who was present in the hearing room, to answer Peters' version of the incident of May 14 particularly after Peters had asserted that Harold could not have heard him, and to repudiate Peters' version of Fred Stark's statements of May 15 and May 17. In the absence of any explanation it would be hard to think of a stronger case for drawing an adverse inference from failure to call a witness under a party's control. 2 Wigmore, Evidence §§ 285-86 (3d ed. 1940). Added to all this is the fact that six of the seven union adherents were discharged, and the seventh threatened, within a week of their signing the cards. It would tax credulity to the breaking point to assume that this was mere coincidence bereft of any casual connection. [Footnote omitted.]

ARGUMENT

1. The issue raised in the petition (Pet. 2)—whether the Board's decision and order was "unenforcible since it was obtained without due process of law because Stark was denied a fair trial by rea-

son of the Administrative Law Judge's (ALJ) out of hand refusal to sequester the alleged discriminatees"—is not presented here. While the court of appeals held that the ALJ should have sequestered the four discriminatees who were discharged on May 11, 1973, it went on to conclude that substantial evidence supports the Board's unfair labor practice findings apart from the testimony of the alleged discriminatees. Accordingly, the only issue really presented is whether the court was correct in this conclusion.[7] Such a purely evidentiary issue does not

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[7] The Board, however, disagrees with the conclusion of the court of appeals that the ALJ's failure to sequester the discriminatees was an abuse of discretion. Individual discriminatees are more than mere witnesses. They are named in the complaint and thus in effect occupy the status of complainants. *T.I.L. Sportswear Corp.*, 131 NLRB 176, 177, n. 1; *Lewis Karlton*, 91 NLRB 1295, n. 3, enforced, 302 F. 2d 186 (C.A.D.C.); *Walsh-Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 295, enforced 291 F. 2d 751 (C.A. 8); *Scott Gross Co., Inc.*, 197 NLRB 420, enforced, 477 F. 2d 64 (C.A. 6); *Jacques Power Saw Co.*, 85 NLRB 440, 443; *Sopps, Inc.*, 189 NLRB 822. Nor is a discriminatee's special status dependent on his personally filing an unfair labor practice charge (see Pet. App. 49a). For no matter who files the charge, the discriminatee's rights under the Act are determined at the hearing, the reinstatement order runs in his favor, and any back pay is awarded to him personally. Moreover, "[i]f the Board denies him relief, in whole or in part, he will be an 'aggrieved person' who can seek review of the Board's order in a United States Court of Appeals." *Sopps, Inc., supra*, 189 NLRB at 822, and cases cited at n. 5. Finally, the Company is not aided (Pet. 8) by Rule 615 of the new Federal Rules of Evidence, because the conduct of unfair labor practice proceedings does not have to conform precisely to the conduct of trials in the district courts and because the Federal Rules of Evidence were

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warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. Moreover, for the reasons set forth, *supra*, pp. 8-9, the court of appeals properly concluded that there was ample basis for the Board's findings apart from the alleged discriminatees' testimony.

2. Contrary to petitioners' contention (Pet. 9-11), the decision below is not inconsistent with the Sixth Circuit's decision in *National Labor Relations Board* v. *Prettyman*, 117 F. 2d 786. In that case, the court denied enforcement of a Board order because the Board had required that the hearing be held in Washington, D.C., rather than in Michigan, the location of the employer's business, the employer's business records, and the employees. Transportation of these persons to Washington "would have required the closing of their plant for ten days and imposed on them a heavy financial burden" (117 F. 2d at 790). Because of this hardship, the Sixth Circuit held that the Board was required "to hold a hearing at a place convenient to each of the parties" (*id.* at 791). In the present case, however, there is no claim that the hearing was held in an inconvenient city.

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not in effect at the time of the hearing in this case. See Pet. App. 51a-52a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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